



James Brown, Chairman

# MONTANA PUBLIC SERVICE COMMISSION UPDATE FOR ETIC OF EXISTING STATE AND FEDERAL LITIGATION PROCEEDINGS

## 1. STATE DISTRICT COURT CASES

BROAD REACH POWER, LLC & NORTHWESTERN ENERGY V. MONT. PUB. SERV. COMM'N.

MONT. 1ST JUD. DIST. CT., CAUSE NO. CDV-202-27

- January 9, 2020 – Petition for Declaratory Judgment filed jointly by Broad Reach and Northwestern.
  - Seeks a declaration from the court that the Commission's practices of questioning witnesses, engaging in investigation, and admission of evidence in contested cases is unlawful.
- April 1, 2020 – Commission filed its response to the Petition denying all of the petitioners' contentions.
- October 13, 2020 – December 30, 2020 – Parties filed motions and supporting briefs for summary judgment.
- March 23, 2021 – Oral Argument on Summary Judgment Motions held before Hon. Judge Seeley.
- Currently awaiting decision on summary judgment from the Court.

APEX SOLAR LLC V. MONT. PUB. SERV. COMM'N AND NORTHWESTERN ENERGY

MONT. 1ST JUD. DIST. CT., CAUSE NO. ADV-2020-1927

- Fall of 2020 – Commission, in a contested case proceeding, considered the Application of Apex Solar asking the Commission to set rates for Apex as a Qualifying Facility under PURPA. Commission issued its Final Order in the matter on September 30, 2020, and issued its order on reconsideration on January 5, 2021.
- Petition for Judicial Review was filed by Apex on November 25, 2020.
  - Asks the Court to find that the Commission's underlying decision was arbitrary and capricious or unsupported by the law.

- *No briefing schedule has yet been set by the Court.*

## HYDRODYNAMICS, INC. V. MONT. DEPT. OF PUB. SERV. REG. & NORTHWESTERN ENERGY

MONT. 1<sup>ST</sup> JUD. DIST. CT., CAUSE NO. CDV-2021-601

- *March 2, 2021 - Commission issued its Final Order on NorthWestern's Petition to update its standard rate, QF-1 tariffs for small qualifying facilities (3MW or less) under PURPA.*
- *April 27, 2021 – Commission issued its Order on Reconsideration.*
- *Hydrodynamics, the owner of at least one small QF to which the QF-1 rates apply, filed its Petition for Judicial Review of the underlying Commission Final and Reconsideration Orders.*
  - *Asks the Court to find that the Commission's Final Order and Reconsideration Order are arbitrary, capricious and/or contrary to law.*
- *Currently awaiting establishment of briefing schedule by Court.*

## 350 MONTANA, ET AL. V. MONT. PUB. SERV. COMM'N, ET AL.

MONT. 4<sup>TH</sup> JUD. DIST. CT., CAUSE NO. DV-32-2021-0000684-IJ

- *May 28, 2021 – Complaint filed by Plaintiffs.*
  - *Names the State of Montana, the Commission, and NorthWestern Energy as Defendants.*
  - *Asks the Court to find that Mont. Code Ann. § 69-8-421 is unconstitutional.*
    - *§69-8-421 allows a qualifying utility to ask the Commission for “pre-approval” of the acquisition of a generating asset.*
  - *The Attorney General's office will be handling the defense of the Commission in this case.*
- *Initial discovery requests were served on the Commission on July 8, 2021.*
- *The Commission's responses to discovery requests will be due on August 9, 2021.*

## 2. MONTANA SUPREME COURT CASES

### MONTANA ENVIRONMENTAL INFORMATION CENTER v. MONT. PUB. SERV. COMM'N, ET AL.

MONTANA SUPREME COURT CASE NO. DA 19-0565

- *September 24, 2018 – Commission issued its Final Order granting NorthWestern Energy waivers of its obligation to satisfy Community Renewable Energy Project (“CREP”) standards (Mont. Code Ann. § 69-3-2004) for compliance years 2015 and 2016.*
- *November 16, 2018 – Montana Environmental Information Center filed a Petition for Judicial Review with the Montana Eighth Judicial District Court, Cascade County, asking the Court to declare the Commission's decision to grant NorthWestern's CREP waivers to be arbitrary, capricious and/or contrary to law.*
- *August 1, 2019 – Hon. Dist. Ct. Judge Manley issued an Order reversing the Commission's Final Order granting NorthWestern's CREP waivers.*
- *September 30, 2019 – NorthWestern and the Commission appealed the decision of the District Court to the Montana Supreme Court.*
- *April 27, 2020 – Briefing by the parties concluded.*
- *Currently awaiting decision on the matter from the Montana Supreme Court.*

CED WHEATLAND WIND, LLC ET AL. v. MONT. PUB. SERV. COMM'N ET AL.

MONTANA SUPREME COURT CASE NO. DA 21-0250

- *March 23, 2020 – July 13, 2020 - Commission issued a series of Final Orders and Reconsideration Orders in response to the Petitions of three separate Qualifying Facilities to set avoided cost rates under PURPA.*
- *August 11 & 18, 2020 – Petitions for Judicial Review filed by all three Qualifying Facilities asking the First Judicial District Court, Lewis & Clark County, to declare the Commission's Final Orders and Reconsideration Orders in the underlying contested cases to be arbitrary, capricious, and/or contrary to law.*
- *October 5, 2020 – All three matters consolidated into one case.*
- *March 12, 2021 – Oral argument held by the court.*
- *April 19, 2021 – District Court issued a decision affirming the Commission's Orders on all issues other than two conceded by the Commission (carbon and legally enforceable obligation).*
- *May 24, 2021 – Appeal filed by QF-Petitioners with Montana Supreme Court.*
- *August 2, 2021 – Opening Brief of Appellants due.*
- *Early September – Commission's Response Brief likely due.*

NORTH STAR DEVELOPMENT, LLC V. MONT. PUB. SERV. COMM'N, et al.

MONTANA SUPREME COURT CASE NO. DA-21-0224

- *September 8, 2020 – Commission issued its final order on North Star's application to set rates for its small water/sewer utility.*
- *October 2, 2020 – North Star filed Petition for Judicial Review in First Judicial District Court, Lewis & Clark County, challenging the Commission's determination of North Star's water/sewer rates.*
- *March 15, 2021 – District Court dismissed North Star's Petition for failure to exhaust administrative remedies.*
- *May 12, 2021 – North Star appealed dismissal by District Court to Montana Supreme Court.*
- *August 22, 2021 – North Star's Opening Brief will be due.*
- *Late September – The Commission's Response Brief likely due.*

In re Big Foot's Application for Class D License

MONTANA SUPREME COURT CASE NO. DA-21-0249

- *January 8, 2018 – Big Foot Dumpsters & Containers, LLC applied for a Class D certificate of public convenience and necessity (PCN) to haul garbage in Flathead County.*
- *February 12, 2018 – Allied Waste Services of North America, LLC, d/b/a Republic Services of Montana and Montana Waste Systems, Inc., d/b/a North Valley Refuse protested Big Foot's Application.*
- *April 9, 2018 – Protestants filed a Petition with the First Judicial District Court, Lewis & Clark County, asking the District Court to stay the Commission proceedings, and for a decision prohibiting the Commission from making inquiry of the parties' witnesses or admitting evidence in the Commission proceeding.*
- *July 9, 2018 – District Court ordered that the Commission was prohibited from issuing discovery requests to parties and ordered that the Commission must appoint a hearing examiner to conduct the contested case proceeding.*
- *December 3, 2018 – Commission appealed District Court decision to the Montana Supreme Court.*
- *August 20, 2019 – Montana Supreme Court remanded back to the Commission and affirmed District Court decision prohibiting Commission discovery.*

- *October 29, 2019 – On remand, the Commission issued a new procedural order addressing the investigative powers of the Commission. Protestants, thereafter, on November 8, 2019, sought reconsideration of the procedural order.*
- *December 23, 2019 – Commission denied the protestant's request for reconsideration.*
- *December 30, 2019 – Protestants petitioned the First Judicial District Court, Lewis & Clark County, for immediate review of the procedural order, and injunctive relief.*
- *January 8, 2020, Big Foot provided the District Court with notice that it had withdrawn its PCN application before the Commission.*
- *January 9, 2020 – NorthWestern Energy sought—and was thereafter granted—permission to intervene in the District Court proceeding for the purpose of challenging the Commission's discovery and investigative powers.*
- *April 20, 2021 – District Court issued an order dissolving a previously issued temporary restraining order allowing Big Foot to withdraw its underlying PCN application before the Commission and dismissed the matter as moot.*
- *May 24, 2021 – Protestants and NorthWestern appealed the dismissal to the Montana Supreme Court.*
- *June 22, 2021 – Commission accepted withdrawal of Big Foot's PCN application following District Court's grant of permission to Big Foot to withdraw.*
- *July 1, 2021 – Motion to Dismiss filed before the Supreme Court by the Commission contending the matter is moot as a result of the voluntary withdrawal of Big Foot's PCN application, and acceptance thereof by the Commission.*
- *August 5, 2021 – Anticipate Opening Briefs from protestants and NorthWestern on merits of the case.*
- *September 4, 2021 – Anticipate Response Brief due from the Commission.*

### 3. FEDERAL LITIGATION

#### BEAVER CREEK WIND I, LLC et al.

FERC DOCKET NO. EL21-86-000

- *June 24, 2021 – Beaver Creek Wind I, LLC, Beaver Creek Wind IV, LLC, Broadview Solar LLC, Meadowlark Solar LLC, and Greenfields Irrigation District filed a Petition for Declaratory Order with FERC asking for a determination that the Commission's practice of allocating liability for incremental network upgrades to qualifying facilities in applications by QFs to the Commission to set rates under PURPA.*
  - *The Commission has retained Wilkinson Barker Knauer, LLP as outside counsel to represent the Commission before FERC.*
  - *The Commission retained WBK in 2018 for the purpose of defending a similar enforcement action which commenced at FERC and then was carried over to the Montana US District Court, and appealed to the Ninth Circuit.*
  - *The Commission prevailed in that proceeding.*
- *July 8, 2021 – Commission filed notice of intervention.*
- *July 22, 2021 – Commission (and other intervenors) filed responses to the Petition.*
- *August 23, 2021 – FERC's deadline to act on the Petition.*

#### 4. RECENTLY COMPLETED LITIGATION

CAITHNESS BEAVER CREEK, LLC v. MONT. PUB. SERV. COMM'N et al.

MONT. 1<sup>ST</sup> JUD. DIST. CT., CAUSE NO. CDV-2020-290

- June 22, 2021 – Commission issued an order setting rates/terms for a power purchase agreement between Caithness and NorthWestern under PURPA following remand back to the Commission from the District Court.

VOTE SOLAR et al. v. MONT. PUB. SERV. COMM'N et al.

MONTANA SUPREME COURT CASE NO. DA 19-0223

- October 6, 2020 – Montana Supreme Court issued an opinion finding Commission's QF-1 avoided cost rate-setting to be arbitrary, capricious, and unlawful. Commission directed to consider opinion in future regulatory proceedings to set QF-1 rates.

MTSUN, LLC v. MONT. PUB. SERV. COMM'N et al.

MONTANA SUPREME COURT CASE NO. DA 19-0363

- September 22, 2020 – Montana Supreme Court issued an opinion finding Commission's decision to set avoided cost rates for MTSUN to be arbitrary and unlawful. Affirmed decision of the 8<sup>th</sup> Jud. Dist. Ct. reversing the Commission's Final Order and Reconsideration Order.